Laborers' International Union of North America, Local 113, AFL–CIO *and* Super Excavators, Inc., and International Union of Operating Engineers, Local 139, AFL–CIO. Case 30–CD–160

October 31, 2002

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). The charge in this proceeding was filed on May 12, 2000, by the Employer, alleging that the Respondent Laborers' International Union of North America, Local 113, AFL–CIO (Laborers Local 113), violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer not to reassign certain work from employees it represents, who were performing the work, to employees represented by International Union of Operating Engineers, Local 139, AFL–CIO (Operating Engineers Local 139). The hearing was held on June 6, 2000, before Hearing Officer Janice K. Gifford.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a Wisconsin corporation, is an underground excavating company with its principal office in Menomonee Falls, Wisconsin. During the 12 months preceding the hearing, it purchased and received goods, material, and services valued in excess of $50,000 directly from suppliers located outside the State of Wisconsin. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Laborers Local 113 and Operating Engineers Local 139 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer, as a member of the Wisconsin Underground Contractors Association (WUCA), is signatory to collective-bargaining agreements with both Unions: the Sewer, Tunnel, and Water Collective-Bargaining Agreement between WUCA and the Wisconsin Laborers' District Council, representing Laborers Local 113; and the Sewer, Water & Tunnel Master Agreement Area I between WUCA and Operating Engineers Local 139.

During the first week of March 2000,[1] the Employer began constructing an underground sewer system, known as the Becher Street Tunnel Project, for the city of Milwaukee. The project requires excavating approximately three-quarters of a mile of "open cut" or surface trench, as well as nearly a mile of underground tunnel, accessed via seventeen vertical shafts (holes) dug into the ground. The Employer assigned employees represented by the Operating Engineers Local 139 to perform the surface level, open cut backhoe work. It assigned Laborers Local 113-represented employees to operate a smaller, mini-excavator (also called a mini-backhoe) for below-grade work.

Excavating a shaft is done in several stages. The initial excavation, beginning at ground level, is done with a 100,000-pound backhoe operated by an Operating Engineers-represented employee. This large surface backhoe is used to dig a hole approximately 5-feet deep. Once that is completed, Laborers-represented employees install bracing in the hole to shore up the sides to keep the shaft from collapsing. Next, the soil at the bottom of the shaft must be loosened, either manually by Laborers Local 113-represented employees or by using a mini-backhoe that has been lowered into the shaft. The loosened soil is gathered into a bucket or "clamshell" which is lifted by crane to the surface. Finally, and simultaneous with the excavation of the shaft, Laborers-represented employees construct shoring around its sides to maintain stability and prevent a cave-in.

By the time of the hearing, the Employer had used the smaller, mini-backhoes on underground vertical shafts at three locations: the intersection of 5th Street and Becher Street, 5th Place and Becher Street, and the intersection of Muskego Avenue and Becher Street.[2]

Not long after the project began, the Employer's president, Jeffrey L. Weakly, heard from job site superintendent Greg Rehak that business agents from Operating Engineers Local 139 were present at the Becher Street Tunnel project site. Weakly was concerned about the possibility of the Operating Engineers filing a grievance over its use of Laborers-represented employees to operate mini-backhoes below ground in tunnels and shafts. Operating Engineers Local 139 had filed similar grievances against the Employer in 1997 and 1998 over its assignment of Laborers Local 113-represented employees to operate these smaller backhoes underground on a job known as the 30th and Brown Project. Those grievances led to an unfair labor practice proceeding in which the Board awarded the work to employees represented by Laborers Local 113.[3]

[1] Dates hereafter refer to 2000.

[2] The Muskego and Becher location is referred to as 22nd and Becher in the Operating Engineers' March 17 grievance, infra.

[3] *Laborers Local 113 (Super Excavators)*, 327 NLRB 113 (1998). This will be referred to hereafter as *Super Excavators I*.

Weakly informed Laborers Local 113 Business Representative Charles Fecteau about the Operating Engineers' apparent interest in the underground backhoe work. On March 20, Weakly received a written response dated March 16, from Fecteau stating, "It is the intent of the Laborers Union to do all in it's [sic] power and use all lawful means to protect the jurisdiction entrusted to the aforementioned unions by the International Union."

Thereafter, by letter of March 27, Operating Engineers Local 139 Business Representative Willie D. Ellis informed Weakly that "Local 139 is presently investigating a possible contract violation concerning the company's use of a mini-backhoe on its underground projects in the Milwaukee area." He requested information about the types of underground backhoes being used, the location of the Employer's projects, and the names and wage rates of the individuals operating the backhoes. The letter stated "nothing contained in this letter is intended to be, nor should it be interpreted to be, a request by Local 139 to assign the operation of the mini-backhoe to employees represented by Local 139."

By letter of April 6, Weakly informed Ellis that, purported disclaimers notwithstanding, he viewed the letter as a claim by Operating Engineers Local 139 for the mini-backhoe work. Weakly stated further that any grievance filed by Local 139, irrespective of its self-characterization or the type of remedy sought, would also be viewed as a competing claim for the work.

On May 8, Weakly received two letters, one dated March 17, and the other April 19, from Operating Engineers Local 139 Business Representative Fran Wewers.[4] Each letter included a grievance. The March 17 grievance sought backpay and benefits for the backhoe operation in the shaft at 22nd and Becher (which is actually the Muskego Avenue and Becher Street location.) The April 19 grievance sought backpay and benefits for the backhoe operation in the shaft at 5th Place and Becher. The nature of both grievances was described as "employees not being paid proper wages & benefits for operating backhoe . . . in shaft." Weakly sent copies of these letters and grievances to Fecteau. The Employer denied both grievances and they remained pending at the time of the hearing.

On May 4, Weakly received a letter from Fecteau. Citing the "endless battle [with the Operating Engineers] over the backhoes in the shaft," Fecteau requested a letter of assignment for underground backhoes. On May 10, Weakly received a fax from Laborers Local 113 Assistant Business Manager John Schmitt referring to the Operating Engineers' grievances. It stated, "Should the assignment continue to be imperilled [sic], Local No. 113 has no other choice but to use every means at it's [sic] disposal, including striking, to protect our jurisdiction."

[4] The record is clear that Wewers signed the grievances at the request of Ellis who was unavailable to sign them himself.

The Employer continued its assignment of the work to employees represented by the Laborers Local 113 and filed the instant charge.

B. Work in Dispute

The work in dispute is the operation of the mini-excavator mobile backhoes below ground in vertical shaft and tunnel construction on the sewer project at the Becher Street Tunnel Project in Milwaukee, Wisconsin.

C. Contentions of the Parties

Operating Engineers Local 139 filed a Motion to Quash the notice of hearing contending that there is no 10(k) dispute because it has made no claim for the work of the operation of the backhoe. Operating Engineers contends that its inquiries regarding the pay and benefit rates being paid to the operator of the mini-backhoe were merely monitoring the enforcement of its contract. The written request stated on its face that it was not "intended to be, nor should it be interpreted to be, a request by Local 139 to assign the operation of the mini-backhoe to employees represented by Local 139." Because the Employer's response revealed that it was not paying the operators of the mini-backhoe the wage rates provided for under its agreement with the Operating Engineers Local 139, the Operating Engineers filed a grievance. The grievance was filed on behalf of the employees performing the work, irrespective of their Operating Engineers or Laborers status, and requested the Employer pay them wages consistent with the applicable (Operating Engineers Local 139) collective-bargaining agreement. The terms of the grievance itself reiterated that "nothing contained within the grievance is intended, nor should it be interpreted to be, a request to change the assignment of the backhoe."

Operating Engineers Local 139 contends that the relief sought, i.e., "all applicable back wages and fringe benefits with interest to be paid to the individual employee(s) assigned to the backhoe," makes clear that it is not attempting to have the work reassigned to employees it represents, but rather that whatever employee(s) who perform the work be paid at the contractually-prescribed level. The grievances merely seek to enforce area standards.

The Employer asserts that a jurisdictional dispute exits. Operating Engineers Local 139's characterization of its grievances notwithstanding, the Employer states that both Unions have claimed the work and that Laborers Local 113 has threatened to strike in support of its claim. They argue that Operating Engineers Local 139's purported disclaimer is invalid because its grievances, on their face, seek to enforce the jurisdictional language of its collective-bargaining agreement and identify Local 139's "bargaining unit employees" as being aggrieved. Moreover, Operating Engineers Local 139 Business Manager Miller testified that he believes the jurisdictional language of the collective-bargaining agreement

supports Operating Engineers-represented employees running the mini-backhoes.[5] The Employer contends therefore, that the "area standards" argument is an after-the-fact effort to avoid the Board's jurisdiction under Section 10(k).

In addition, the Employer requests a broad order awarding the work to Laborers Local 113. Noting that this is the second time a dispute has arisen involving the same parties over this type of work, the Employer contends that the conduct and statements of both Unions suggest that they will each continue to assert their right to perform any similar work which may arise in the future. Thus, there is a likelihood of future disruptions as a result of their continuing, conflicting claims.

Laborers Local 113 essentially reiterates many of the arguments raised by the Employer, asserting that Operating Engineers Local 139's pursuit of grievances requesting the Employer to pay Operating Engineers wage rates to employees performing underground mini-backhoe work amounts to a claim under its collective-bargaining agreement for the work. In addition, the Laborers Local 113 maintains its right to perform the work assigned to it, that it has informed the Employer of its intent to retain that work, and that it will use all necessary means to enforce continuation of the assignment, including striking.

Both the Employer and Laborers Local 113 contend that an award of the work to employees represented by Laborers Local 113 is warranted by the parties' collective-bargaining agreement, the Employer's preference and past practice, area and industry practice, relative skills and training, and economy and efficiency of operations. Laborers Local 113 further points out that the prior Board decision (*Super Excavators I*, supra) involving the same parties and the same type of work favors an award to Laborers-represented employees, as does an arbitrator's decision that issued subsequent to *Super Excavators I*.[6]

Following the close of the hearing, the Employer moved, and the Laborers joined in the motion, to reopen and supplement the record. Operating Engineers Local 139 filed an opposition to their motion.[7]

D. Applicability of the Statute

Before the Board may proceed with a determination of a dispute under Section 10(k) of the Act, it must be satisfied that: (1) there are competing claims for the work; (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute.[8]

Having had its pay-in-lieu approach treated as tantamount to a claim for work in *Super Excavators I*, Operating Engineers Local 139 now offers a variation of that theory. Rather than asking that employees it represents be specially compensated for not having been assigned the work, Local 139 now seeks to have its contract wage rates applied directly to the employee assigned to operate the mini-backhoe, irrespective of the fact that this individual is represented by Laborers Local 113. While this refinement would not impose the "double jeopardy" burden of the pay-in-lieu remedy, the fact remains that Local 139, by filing the grievance, is necessarily claiming that the work performed by the mini-backhoe operator is covered by its collective-bargaining agreement.

The grievance asserts that the Employer violated, inter alia, Section 1.3 of its collective-bargaining agreement with Local 139, which provides as follows: "the Employer hereby agrees to assign all work that is to be performed in the categories described in [the agreement] to employees in the bargaining unit covered by this Agreement," i.e., to employees that Local 139 represents. In its posthearing brief, Local 139 specifically asserts that "the operation of the mini-backhoe in the shaft is covered by the Local 139 Master Agreement," and that it is "the sole and exclusive bargaining agent for all employees" who perform that work. Thus, Local 139's grievance literally seeks to have the disputed work assigned to employees that it represents. See *Laborers Local 931 (Carl Bolander)*, 305 NLRB 490, 491 (1991) (a claim to the work in dispute based on an asserted contractual right to the work "constitutes a claim to the work.").

The testimony of Local 139 Business Manager Miller, who participated in negotiations for the collective-bargaining agreement between the Operating Engineers and the Employer, provides further support for finding that Local 139 is asserting a claim to the dispute work. Miller stated that, in his view, his Union's contract jurisdiction covers the operation of the backhoes within the shaft, i.e., that the work in dispute properly belonged to Local 139. This statement of intent is consistent with Local 139's statements and actions in *Super Excavators I* and in *Michel's Pipeline*, 338 NLRB No. 51 (2002), is-

[5] Art. VI, sec. 6.1 lists various equipment to which Operating Engineers Local 139-represented employees will be assigned. Despite the absence of any reference to backhoes, Business Manager Miller testified that backhoe operations are covered because they are listed within Art. X, section 10.1, the wage rate classification section of the contract.

[6] The November 18, 1998, arbitrator's decision dismissing Operating Engineers Local 139's grievance based upon the earlier dispute was introduced into the record of this proceeding as Emp. Exh. 17.

[7] The Employer and Laborers Local 113 seek to have admitted into the record the November 2000 issue of the *Operating Engineers Local 139 Wisconsin News*, an official publication of that union. They contend that a column written by Operating Engineers Local 139 Business Manager Dale Miller contains statements that support their contention that his union is claiming the work at issue in this proceeding. We find that the existing record contains sufficient evidence to decide the issue before us and it is therefore unnecessary to consider any additional materials. Accordingly, we deny the motion to reopen and supplement the record.

[8] *Carpenters Local 275 (Lymo Construction Co., Inc.)*, 334 NLRB No. 67, slip op. at 2 (2001); *Teamsters Local 259 (Globe Newspaper Co.)*, 327 NLRB 619, 622 (1999); *Laborers Local 113 (Super Excavators)*, 327 NLRB 113, 114 (1998).

sued this day, which also evidence Local 139's long-standing and consistent position that it does, in fact, claim the disputed work. In these circumstances, we find that Operating Engineers Local 139 has made a claim for the disputed work.

Thus, we reject our dissenting colleague's contention that Local 139's grievance does not seek the reassignment of the disputed work to an employee represented by Local 139. Her position is belied by the language of the grievance itself and by Local 139's statements and actions in this and other similar proceedings. Our dissenting colleague fails to justify her curious conclusion that this grievance, on its face, is not a claim for the disputed work, or her apparent belief that Local 139 has consistently claimed this very work, previously with this very same employer and, contemporaneously with this dispute, with at least one other employer in the very same area, but has not done so in this case.

To the extent that the dissent relies on the language in Local 139's grievance disclaiming any interest in having the disputed work reassigned, that disclaimer is inconsistent with the grievance itself and with Local 139's statements and conduct described above. Accordingly, the purported disclaimer is ineffective. See *Operating Engineers Local 150 (Austin Co.)*, 296 NLRB 938, 939 (1989) (party raising issue of disclaimer "has the burden of proving a clear, unequivocal, and unqualified disclaimer of all interest in the work in dispute." (emphasis in original)). We likewise reject the dissent's reliance on Local 139's assertion of an area standards rationale for its actions. Regardless of whether the Employer's assignment of the disputed work to employees represented by the Laborers would affect area standards or the prevailing wage rate, Local 139's grievance concerning that work assignment is sufficient to establish the existence, for the purpose of this proceeding, of competing claims to that work. *Electrical Workers IBEW Local 701 (Federal Street Construction)*, 306 NLRB 829, 830–831 (1992) (rejecting union's claim that its alleged efforts to enforce area standards was not a claim for the disputed work).[9]

Rather than asking that one of its unit members be specially compensated for not having been assigned the work, Local 139 instead seeks to have its contract wage rates applied directly to the employee assigned to operate the mini-backhoe, irrespective of the unit to which he or she may belong. While this refinement would not impose the "double jeopardy" burden of the pay-in-lieu remedy, it nevertheless would require the Employer to shoulder the Operating Engineers' contract costs irrespective of its assignment preference. Thus, despite Operating Engineers' effort to restyle its grievance to disguise its intent, we find its remedial objective substantively the same as in *Super Excavators I*; that is, a claim under its contract for the mini-backhoe work.[10]

The testimony of Operating Engineer Local 139 Business Manager Miller, who participated in negotiations for the collective-bargaining agreement between the Operating Engineers and the Employer, provides further support for finding that the Operating Engineers is asserting a claim to the work. He stated that, in his view, his Union's contract jurisdiction covers the operation of the backhoes within the shaft, i.e., that the work in dispute properly belonged to Local 139. In these circumstances, we find that Operating Engineers Local 139 has made a claim for the mini-backhoe work.

Operating Engineers also contends that Laborers Local 113's purported threats of economic action in the event the mini-backhoe work were reassigned are a sham, designed merely to bring the case before the Board. Operating Engineers Local 139 asserts that there is no valid reason for the Laborers to strike because the grievance it filed merely seeks application of a higher pay rate, not reassignment of the work away from Laborers-represented employees. Moreover, the Employer acknowledges that the Laborers have never engaged in a strike over this issue.

We reject Operating Engineers Local 139's characterization of Laborers Local 113's threat and find that Fecteau's March 16 letter and Schmitt's May 10 fax to the Employer each contained a valid threat. These communications establish that Laborers Local 113 interpreted Operating Engineer Local 139's grievance as seeking to obtain the mini-backhoe work. They were intended to warn the Employer that it would take economic action, including striking, if the work was reassigned. There is no evidence that these statements were a sham.[11] Therefore, we find that reasonable cause exists to find that a violation of Section 8(b)(4)(D) has occurred within the meaning of Section 10(k) of the Act.

The Employer, the Laborers, and the Operating Engineers stipulated at the hearing that there is no agreed-upon method for the voluntary adjustment of the work in dispute. Absent an agreed-upon method for the voluntary adjustment of the dispute, we find that the matter is properly before the Board for determination. Thus, we

[9] In *Super Excavators I*, Operating Engineers Local 139 further undermined its own characterization of the purpose of its grievance by admitting in a cover letter that it was seeking assignment of the work.

[10] We find Operating Engineers Local 139's effort to encompass its actions within the holding of *Laborers (Capitol Drilling Supplies)*, 318 NLRB 809 (1995), unpersuasive. That case involved a union's grievance against a general contractor alone, and not against the subcontractor who actually had the authority to assign the work involved. Absent a direct claim (grievance) against the subcontractor, the Board found no competing claim by the union for the work and quashed the notice of 10(k) hearing.

Member Cowen agrees that *Capitol Drilling* is distinguishable and therefore does not pass on whether that case was correctly decided.

[11] See *Teamsters Local 6 (Anheuser Busch)*, 270 NLRB 219, 220 (1984).

find no merit in the Operating Engineers' argument that the notice of hearing should be quashed.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreements

There is no evidence that either Union has been certified to represent employees performing the disputed work. Both Unions assert, however, that their collective-bargaining agreements entitle them to the disputed work.

The Employer is party to separate collective-bargaining agreements with the Operating Engineers Local 139 and Laborers Local 113. As a member of the Wisconsin Underground Contractors Association (WUCA), the Employer is signatory to the Sewer, Water, & Tunnel Master Agreement Area I with Operating Engineers Local 139. Also through its WUCA membership, the Employer is party to the Sewer, Tunnel, and Water Laborers' Collective Bargaining Agreement with Wisconsin Laborers' District Council which represents Laborers Local 113. Both contracts are effective from June 1, 1998 through May 31, 2003.

Article 1 of the Laborers Local 113 contract covers "all public works construction including construction, excavation, installation . . .of sewer and water mains . . . tunnels, shafts, and appurtenances and related work." Article 21 defines the Laborers' jurisdiction of public works as including "construction, excavation, installation . . . of sewer and water mains . . . shafts, tunnels . . . and related work." In addition, the classification "backhoe operator" was included in the wage rate addendum of the Laborers agreement effective June 1, 2000.

Article VI of the Operating Engineers Local 139 contract sets forth the Union's jurisdiction and lists the equipment covered by the agreement. There is no reference to backhoe in that section. In the wage rate section however, Class 1 rate is assigned to Operating Engineers running backhoes (excavators) over 130,000 pounds and Class 2 rate is assigned to those running backhoes (excavators) less than 130,000 pounds.

Based on the above, we find that while the Laborers Local 113 collective-bargaining agreement contains language apparently covering the work in dispute, so too does the Operating Engineers Local 139 contract arguably encompass the work. Therefore, we find the factor of collective-bargaining agreements does not clearly favor an award to either group of employees.

2. Employer preference and assignment

The Employer prefers to assign, and has assigned, all underground work to employees represented by Laborers Local 113 because they are familiar with and experienced in the shoring-up procedures and help to fill the two-man teams required on each crew. Accordingly, we find that the factor of employer preference and assignment favors an award of the disputed work to employees represented by Laborers Local 113.

3. Area and industry practice

The evidence indicates that within the last 10 years the Employer has almost invariably assigned the work of operating mini-excavators at excavation projects to employees represented by the Laborers. The only exceptions appear to have occurred in an emergency situation in 1997 and an instance when a site superintendent made an assignment at a jobsite.[12] Evidence shows that in the past 20 years, Laborers Local 113-represented employees have performed the majority of this type of work for Milwaukee area contractors, and since 1998, all such assignments have been to Local 113.

Operating Engineers Local 139 adduced evidence during the hearing in *Super Excavators I* showing that other area employers have assigned work of the type at issue to employees it represents. During the hearing in this proceeding, Operating Engineers Local 139 Business Representative Ellis provided anecdotal evidence that in February 2000, an Operating Engineers-represented employee ran a backhoe below ground for a 3-day period for Kenny Construction Company, after which time the work was performed by a Laborers-represented employee.

We conclude from the foregoing that the Employer's past practice, as well as area and industry practice, favor awarding the work to the Laborers Local 113-represented employees.

4. Relative skills, training, and safety

Operating Engineers Local 139 points to its training facility in Coloma, Wisconsin, which offers classes for operating backhoes ranging in size from 10,000 to 130,000 pounds. Instruction is provided for operating a backhoe in close proximity to other employees. The Employer has admitted that it is satisfied that Operating Engineers Local 139-represented employees operate the larger surface backhoes safely and efficiently.

The Employer is also satisfied with the performance of Laborers Local 113 employees' operation of the mini-backhoe. The Employer emphasizes, however, that the excavation of shafts and tunnels requires more than just

[12] These instances occurred prior to the hearing in *Super Excavators I*. The record in that proceeding was admitted into evidence in this proceeding as a Jt. Exh.

operating the mini-backhoe and that removing soil and shoring up the sides of the shaft are integral parts of the task. The shoring up process itself—which is quintessential Laborers-type work—is a two-person job. It requires familiarity with certain tools and equipment and close coordination with one another as well as close coordination with the operator of the mini-backhoe. Because of space limitations in the shaft, employees must be sufficiently skilled to work together cooperatively in order to perform the entire operation correctly and safely. A Laborers-represented mini-backhoe operator is familiar with and competent not merely to assist in, but also actually to perform the shoring up functions that constitute a vital aspect of the work in the shaft. Experience with these attendant shaft construction duties not only contributes to the successful completion of the task, but also enhances its safe completion.

Accordingly, we find that while Operating Engineers Local 139 has formalized training for backhoe operation, and both the Operating Engineers and Laborers Local 113 are equally skilled at running the mini-backhoe, safety considerations warrant awarding the work to Laborers Local 113-represented employees.

5. Economy and efficiency of operations

Once soil is removed from an excavation site with a backhoe, the sides of the resulting shaft must quickly be buttressed in order to prevent cave-ins. This involves rigging and lagging of the sides of the hole, trimming away the dirt, and "haypinning" with steel rebar and hay to secure the walls at their base. This shoring up of the shaft is acknowledged to be Laborers work. Operating Engineers, who are proficient with backhoe operation, are not trained nor do they normally perform the attendant duties of securing the shaft walls. Thus, if an Operating Engineers-represented employee were running the mini-backhoe, it would be necessary for a Laborers-represented employee to enter the shaft to perform the shoring up tasks after the backhoe work is complete. This would mean that an Operating Engineers Local 139-represented backhoe operator would remain idle while the two-person shoring operation took place. By contrast, a Laborers-represented mini-backhoe operator, upon completing the backhoe work, normally gets off the backhoe and assists his fellow Laborers-represented employee in completing the shoring work. In the event the work is awarded to the Operating Engineers, another Laborers-represented employee would have to be assigned to complete the two-person team on each shaft crew. Accordingly, we find that the factor of economy and efficiency of operation favors awarding the disputed work to employees represented by Laborers Local 113

CONCLUSIONS

After considering all the relevant factors, we conclude that employees represented by the Laborers' International Union of North America, Local 113, AFL–CIO, are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference, assignment, and past practice, area practice, safety and efficiency and economy of operations.

In making this determination, we are awarding the work to employees represented by the Laborers, not to that Union or its members.

Scope of the Award

The Employer requests that the Board issue a broad award, covering the entire Laborers Local 113 region, including Milwaukee, Ozaukee, and Washington Counties in Wisconsin, in order to prevent future disputes at jobsites where the equipment at issue is being used. The Employer cites the behavior of both Laborers Local 113 and Operating Engineers Local 139, as evidenced by their prior appearance before the Board in a similar jurisdictional dispute, in support of its request.[13] The Employer argues that Operating Engineers Local 139 has demonstrated its proclivity to file grievances over the assignment of the work to non-Operating Engineers-represented employees and that Laborers Local 113 has promised to take any action required—including striking—to counter those grievances. Thus, both Unions are poised to continue the controversy.[14] In addition, the Employer states that the volume of this kind of work is likely to increase over the next few years, in light of planned projects being undertaken by the Milwaukee Metropolitan Sewerage District, thereby enhancing the likelihood and frequency of similar disputes arising again.

While the pattern of conduct by both Unions suggests that similar disputes may arise again, it is the Board's practice to decline to grant an area-wide award in cases in which the charged party represents the employees to whom the work is awarded and to whom the Employer intends to continue to assign the work.[15] Accordingly, in these circumstances, we find a broad award is not warranted. The determination is therefore limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following determination of dispute.

Employees of Super Excavators, Inc., represented by Laborers' International Union of North America, Local 113, are entitled to perform the operation of the mini-excavator (backhoe) in below ground shaft and tunnel

[13] *Super Excavators I*, supra.

[14] The Employer argues that while Laborers Local 113 is the party charged with engaging in proscribed conduct, a broad award to employees it represents should not be precluded inasmuch as it was the Operating Engineers Local 139's grievance which initiated the dispute and precipitated the threat.

[15] *Bricklayers (W.R. Weis Co.)*, 336 NLRB No. 51, slip op. at 4 (2001); *Plumbers Local 562 (Grossman Contracting Co.)*, 329 NLRB 516, 528 (1999); *Laborers (Paul H. Schwendener, Inc.)*, 304 NLRB 623 (1991).

excavations on the sewer project ongoing at the Becher Street Tunnel Project in Milwaukee, Wisconsin.

Dated, Washington, D.C. October 31, 2002

William B. Cowen, Member

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

Unlike my colleagues, I would find that Operating Engineers Local 139 did not make a claim to the disputed work, and I would therefore grant its Motion to Quash this Section 10(k) proceeding. In my view, the grievances filed in this case by Local 139 were fundamentally different from those at issue in *Super Excavators I*, 327 NLRB 113 (1998), and do not constitute an effective claim for the underground excavation work.

Local 139 filed two grievances, on March 17 and April 19, 2000. Both identify the issue as the Employer's failure to pay the proper wages and fringe benefits to the employee operating the backhoe in the shaft. Both grievances describe the relief sought in identical terms: that is, all applicable back wages and fringe benefits to be paid "to [the] individual employee(s) assigned to backhoe." Each grievance states that it is neither "intended nor should be interpreted to be a request to change the assignment of the backhoe." Nothing in the grievances suggests that Local 139 actually was seeking the reassignment of the backhoe work to an Operating Engineers-represented employee. Rather, the grievances seek only that the individual (a Laborers-represented employee) performing that work be paid at the rate specified in the Operating Engineers' contract.

While a disclaimer of any interest in reassignment of the disputed work is, of course, not necessarily controlling, here there is no evidence presented that is inconsistent with a disclaimer. Indeed, the stated purpose of the grievances is confirmed by the testimony of Local 139 Business Manager Miller and Business Representative Ellis.[1] They explained that, to resolve the grievances, the Employer need only pay the backhoe operator(s) at the rates specified in its collective-bargaining agreement with Local 139. Ellis described the grievances as designed to ensure that the Employer "paid the proper wages, fringes, and benefits for the individual that was performing these duties."[2] He specifically denied that Local 139 was seeking to have the individual who was performing the underground backhoe work replaced with a different individual who was represented by Local 139.

Miller and Ellis further explained that Local 139 negotiates Master Agreements to establish universal wage rates for work performed within its geographic jurisdiction. In their view, should a contractor pay wage rates beneath those set forth in the Master Agreement, not only would the Union's negotiated terms and conditions be undermined, but the state's prevailing wage rate, established through a survey of the rates actually paid for various types of work, would also be brought down. Thus, the Operating Engineers' grievances sought to protect an interest separate and independent from any claim for the underground backhoe work itself: the preservation of area standards. I find merit in Local 139's position.

The majority nonetheless concludes that the grievances were tantamount to a claim to the work, citing *Super Excavators I*. At issue in that earlier case was a grievance filed by Local 139 seeking "pay-in-lieu" of work. A pay-in-lieu remedy does not directly seek reassignment of the work, but it would require the Employer to pay back wages and benefits, plus interest, to individuals who would have been referred by Local 139 to perform the underground backhoe work, but for the Employer's assignment of the work to non-Local 139-represented workers. This remedy would compel the Employer to pay twice for the same work: once to the employee(s) who actually performed the job and again to the Operating Engineers-represented individual(s) who did not receive the assignment. The Board has held that a pay-in-lieu grievance may constitute a competing claim for work.[3]

Here, by contrast, Operating Engineers Local 139's grievances do not seek reassignment *or* pay-in-lieu. Rather, the grievances seek only that the Employer pay the employee(s) who actually performs the work at the (higher) rate specified in the Local 1309 collective-bargaining agreement. True, requiring the Employer to pay the Operating Engineers' contract rate as a remedy may defeat its economic incentive for assigning the work to Laborers-represented employees, but it is speculation to say that the Employer would necessarily decide to reassign the work.[4]

What is key here is the relief sought, for that shows what the Union seeks to achieve. Local 139 has a contract with the Employer arguably covering the backhoe work, and although it unsuccessfully sought to claim the

[1] The grievances were filed following Ellis' investigation and at his direction.

[2] Tr. of record of proceedings at p. 193.

[3] *Carpenters Los Angeles Council (Swinerton & Walberg)*, 298 NLRB 412, 414 (1990); *United Slate, Tile & Composition Roofers, Local 30 v. NLRB*, 1 F.3d 1419, 1427 (3d Cir. 1993). Cf. *Longshoremen ILWU Local 7 (Georgia-Pacific)*, 291 NLRB 89 (1988), where the Board reversed an earlier decision and concluded that a pay-in-lieu grievance filed before a 10(k) determination does not constitute unlawful coercion under Sec. 8(b)(4)(ii)(D) of the Act.

[4] Contrast a "pay-in-lieu" remedy where the employer would more likely reassign the work to the grieving union than pay double wages.

work itself, it should be able to defend the wage standards of that contract without automatically triggering a jurisdictional dispute. Its previous effort to seek reassignment of the work through its "pay-in-lieu" grievance surely does not forever foreclose it from otherwise seeking to enforce wage rates that it believes the Employer is undercutting. Because I see nothing compelling us to treat Local 139's grievances as a question of disguised intent, I take them at face value—directed at maintaining contractual and area standards. The majority's puzzlement at my position, which distinguishes between a claim for the work and the grievance remedy sought by Local 139, reflects a failure to recognize the obvious: that Local 139 is pursuing an alternative to claiming the work, not merely a disguised claim for the work. The grievance itself makes that clear, by forsaking reassignment of the work as a remedy. That, all other things being equal, Local 139 might well have preferred reassignment, and that it might argue its entitlement to the work if, over its objections, a 10(k) proceeding moves forward, does not alter the nature of its grievance.

Given the fundamental difference in the nature of the relief sought in this case and in *Super Excavators I*, that earlier case is distinguishable and does not control the outcome here. Moreover, in *Super Excavators I*, the true objective of the grievance was revealed in the accompanying cover letter, where the Local 139 business representative acknowledged that the Union would prefer to have the assignment given to one of its own unit members. There is no such admission in this case. To the contrary, Operating Engineers Local 139 representatives have repeatedly asserted that it is not seeking a reassignment of the work, and there is no inconsistent evidence. Absent any evidence that Local 139 was actually seeking relief that was neither set forth in its grievances nor communicated in any other way, I would find that it has not made a claim for the underground backhoe work for employees it represents.

Accordingly, I would grant Operating Engineers Local 139's motion to quash.

Dated, Washington, D.C. October 31, 2002

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD